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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GLENN A. LERNER, Plaintiff and Appellant, v. 180 PROPERTIES LLC et al., Defendants and Respondents.	A153365 (Contra Costa County Super. Ct. No. N17-1380)

MEMORANDUM OPINION[1]

After Judicial Arbitration and Mediation Service (JAMS) neutral arbitrator Cecily Bond issued an interim arbitration award, finding against plaintiff and appellant Glenn A. Lerner,[2] JAMS notified the parties Bond had been asked to mediate a case in which one of the law firms representing one of the defendants in this case would participate.

Lerner immediately transmitted a "notice" of "disqualification" to JAMS, claiming the "No" box for item 16 on the arbitrator disclosure statement had been checked, indicating Bond would not entertain offers of other employment that would involve any of the parties or lawyers involved in the instant dispute.[3] Lerner could not dispute,

[1] We resolve this case by memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1.

[2] The nature of Lerner's claims, and why Bond rejected nearly all of them and ultimately rejected his request for dissolution of defendant 180 Properties LLC, are not relevant to the issue on appeal.

[3] Item 16 provided as follows:

however, that this "No" box was immediately to the right of a "Yes" box that was prominently marked with an "X." Nor could he dispute that the supposed checkmark in the "No" box was distinctly different from all the other checkmarks on the form (and, specifically, looked like it had been crossed-out or scribbled-out). Undaunted by what the graphics appeared to show, Lerner claimed that because JAMS had sent notice of Bond's selection as a mediator in another case, this *necessarily* meant the questionable mark on the "No" box was the operative mark because JAMS is not "required" to give notice of other employment when the "Yes" box is marked.

Within minutes of Lerner's e-mail transmission of his notice of disqualification, the defense lawyer who had asked Bond to mediate the other matter, notified JAMS (also by e-mail) that the parties in the other matter would select a different mediator. Within minutes of that e-mail, JAMS confirmed (by e-mail) that Bond had taken no action in connection with the mediation and she had been removed as mediator.

JAMS then invited defendants to file responses to Lerner's notice of disqualification and indicated it would refer the issue to its National Arbitration Committee. Lerner responded that neither briefing nor referral was proper, and that his

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> "16. Will the arbitrator entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party, lawyer in the arbitration, or lawyer or law firm that is currently associated in the private practice of law with a lawyer in the arbitration while that arbitration is pending, including offers to serve as a dispute resolution neutral in another case?
>
> "CRC Ethics Standards 7(b)(2).
>
> "If this is a nonconsumer arbitration, this disclosure constitutes a waiver of any further requirement to disclose offers of subsequent employment involving the same parties or lawyers or law firms.
>
> "(CRC Ethics Standards 12 (b).)
>
> "If this is a consumer arbitration, the arbitrator will inform the parties of a subsequent offer while this arbitration is pending. (CRC Ethics standards 12 (d)[.)]"

notice was effective immediately and Bond had "the obligation to acknowledge her disqualification now, and to not proceed further acting as arbitrator in this case."

Defendants thereafter filed written responses to Lerner's notice of disqualification. They first took issue with Lerner's claim that Bond had represented she would not accept other work involving the parties or the lawyers. In their view, the "Yes" box had been plainly and prominently marked with an "X," and any checkmark that had been put in the "No" box had just as plainly been crossed-out. They secondly asserted that the absolute most that could be said about item 16 of the disclosure statement was that the crossed-out checkmark in the "No" box created an ambiguity as to this particular item, and it was incumbent on Lerner to raise any concerns he had when he received the disclosure statement. What he could not do was remain silent, see how he fared in the arbitration, and after receiving an adverse ruling, suddenly take the position Bond had failed to disclose she would consider other offers of employment.

Lerner submitted a reply, reasserting that his notice of disqualification was "self-executing" and JAMS had incorrectly referred to it as only a " 'motion,' " defendants had no right to file responses, no independent JAMS neutral could or should review the issue, and Bond "should admit" that her disclosure form indicated she would not accept other offers of employment involving the same parties or lawyers.

The JAMS National Arbitration Committee thereafter submitted its report and recommendation in a letter signed by Richard Chernick. With respect to the disclosure form and the boxes, the report stated: "The answer to the inquiry in Paragraph 16 of the Disclosure is pre-checked (X) 'yes.' There is a space ( ) to the right where the Arbitrator could check 'no.' The (X) under 'yes' is untouched. The ( ) under 'no' appears to have been checked and was then overwritten with a slanted line. [¶] . . . [¶] It appears clear that the mark under 'no' is not a check as it does not resemble the other check marks on the page. It is likely that the 'no' box was marked and then over-marked so that the (X) under 'yes' was the intended action. Claimant's assertion that he assumed this meant 'no,' in these circumstances is unsupported by the evidence. . . ." The committee further concluded that even if Bond's response on the disclosure form was "unclear, it should

have been addressed at the time it was served," and Lerner's "failure to seek timely clarification" made his disqualification notice untimely.

As he had threatened, Lerner promptly filed a petition to vacate the arbitration award on the ground Bond had violated the ethical standards applicable to neutrals and was disqualified. He continued to ground his disqualification claim on the assertion Bond had "served the parties with a Disclosure Checklist in which she handwrote a checkmark in a box indicating she would not accept work from any attorney involved in the dispute while the arbitration was proceeding."

In their opposition, defendants continued to maintain the "Yes" box had been prominently marked with an "X" and Bond had thus clearly disclosed she would accept other employment. And even assuming the crossed-out checkmark in the "No" box could have raised any question in this regard, it was far too late for Lerner to raise the point in an effort to vacate the award against him.

Following a hearing, the trial court affirmed its tentative ruling to deny the petition to vacate and subsequently issued a five-page written order.

The trial court first rejected Lerner's assertion that Bond had disclosed she would not accept other work involving the same parties or lawyers, stating: "The Arbitrator did make a disclosure in her Disclosure Worksheet within the required period of time under Code of Civil Procedure § 1281.9. That disclosure left Question 16 marked clearly with an (X) for 'yes' to the question whether she intended to accept employment from a party or a lawyer for a party to the current arbitration during its pendency. The court concludes that the Disclosure Worksheet is not marked 'no' nor is [it] ambiguous. The mark over the 'no' box is fairly clearly *a mark-out* or erasure over the 'no' ( ). Indeed, the right part of the box has also appears [*sic*] to have been erased–'),' also showing that intent."[4]

[4] At the outset of the hearing, Lerner's attorney complained the court had been presented with three different copies of the disclosure form and the copy Lerner had submitted (and had received at the outset of the arbitration) differed from the other two, which seemed to show a less prominent, or even an "erased," mark in the "No" box. The court observed that the copy submitted by Lerner and that submitted by defendants appeared to differ simply because of "different darkness settings on the copy machine."

Because it found the only plausible reading of the disclosure form was that Bond would accept other work involving the same parties or lawyers, the court ruled the petition to vacate failed on this ground, alone. The court observed its finding in this regard was the same as the "factual determination" by the JAMS National Arbitration Committee. While the court suggested a "cogent argument" could be made that the JAMS findings were "all but determinative," the court expressly stated its ruling did not rest on those findings.

The trial court next concluded that even if the disclosure form could credibly be characterized as being ambiguous, which the court reiterated it could not, Lerner "was on notice right from the start" that the arbitrator might entertain other employment given the clear and prominent "X" in the " 'yes' " box, and "[i]f that was a concern to plaintiff, the time to raise it (and to ask for clarification of any ambiguity) was within fifteen days–not to wait until plaintiff had lost the arbitration."

Following the denial of Lerner's petition to vacate, defendants filed a petition to confirm the arbitration award. Lerner filed a response, incorporating the points he had previously made, unsuccessfully, in his petition to vacate the award and objecting to defendants' lengthy " '[f]actual' " statement as unsupported and irrelevant. Lerner also objected to defendants' request that interest be awarded from the date of the award. The trial court granted the petition to confirm and ordered prejudgment interest from September 22, 2017 to the date of the order affirming the award.

Lerner appeals from both the order denying his petition to vacate and the order granting the petition to confirm the arbitration award. The sole basis of his appeal is that Bond was disqualified and therefore the arbitration award must be vacated.

In any case, the court assured Lerner that its tentative ruling had been based on the copy Lerner had submitted, and its final ruling would likewise be based on that copy. But even as to that copy, the court found "it not plausible that you and your client [Lerner] looked at this document and said, holy cow, she checked 'yes' on Question 16, but I don't have to worry about that because there is a handwritten mark."

While the parties devote many pages of briefing to whether the standard of review on appeal is de novo or for substantial evidence, and to whether the findings of the trial court and the JAMS National Arbitration Committee are entitled to any deference, we need not, and do not, resolve these issues. Even under a de novo standard of review, and disregarding the findings of the trial court and the JAMS National Arbitration Committee, we conclude Lerner's appeal is meritless.

After defendants filed their joint respondents' brief, but before Lerner filed his appellant's closing brief, the Second District Court of Appeal filed its opinion in *Honeycutt v. JPMorgan Chase Bank* (2018) 25 Cal.App.5th 909 (*Honeycutt*). Significant portions of that opinion, with which we agree, are directly on point and dispositive of Lerner's appeal.

In *Honeycutt*, an AAA arbitrator in a discrimination and wrongful termination case completed a form disclosure statement. (*Honeycutt, supra*, 25 Cal.App.5th at pp. 915–916.) The arbitrator answered " 'no' " to the question of whether he had any significant relationships with the parties or lawyers and averred, in the oath at the conclusion of the form, that he had run a " 'conflicts check.' " (*Id.* at pp. 916–917.) Unfortunately, the copy of the disclosure statement served on the parties was missing the page that included the disclosure as to whether the arbitrator would accept work in other matters in which the parties or lawyers would be participants. (*Ibid*.) However, it was clear from the page following the missing page that the arbitrator had answered " 'yes,' " as the subsequent page briefly " 'explained' " his " 'yes' " answer by essentially reiterating he would entertain other matters. (*Id.* at p. 917.) After the arbitrator ruled against the plaintiff, her attorney asked AAA to check its records and discovered the arbitrator had handled many cases in which Chase and its lawyers had been involved. (*Id.* at pp. 917–918.) AAA also disclosed that during the pendency of the current arbitration, the arbitrator had handled eight other cases involving Chase. The parties, however, had been notified of only four of these cases. (*Id.* at p. 918.) The trial court denied plaintiff's petition to vacate and granted Chase's petition to confirm the award. (*Id.* at pp. 919–920.)

After an extensive discussion of the disclosure requirements pertaining to neutrals and the ramifications of failure to disclose (*Honeycutt, supra*, 25 Cal.App.5th at pp. 920–925), the Court of Appeal turned specifically to the arbitrator's failure to comply with California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, ethics standard 12(b), requiring disclosure of whether the neutral will hear other matters in which the parties or the lawyers are participants. (*Id.* at p. 925.) Because of the missing page, the arbitrator had not complied with this ethical standard, and the explanation on the subsequent page did not cure the problem. (*Ibid.*)

Nevertheless, Honeycutt was not entitled to relief, said the appellate court, as she had "waived her right to vacate the award based on the arbitrator's failures to comply with ethics standard 12(b)." (*Honeycutt, supra*, 25 Cal.App.5th at p. 925.) "A party may waive the right to disqualify an arbitrator by failing to object to the arbitrator's failure to disclose a matter the Ethics Standards require the arbitrator to disclose. Section 1281.91, subdivision (c), provides that the 'right of a party to disqualify a proposed neutral arbitrator pursuant to this section shall be waived if the party fails to serve' a notice of disqualification within 15 days after the arbitrator fails to comply with the disclosure obligations under section 1281.9 or the Ethics Standards, 'unless the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure.' " (*Honeycutt*, at pp. 925–926)

"Honeycutt," the appellate court explained, "knew in July 2014, upon learning the identity of the proposed arbitrator and receiving the incomplete disclosure worksheet, that the arbitrator had failed to send the parties the page containing question Nos. 21–28. Honeycutt also knew that the arbitrator had answered question No. 28 and that the answer related to a question about serving as an arbitrator or mediator in other cases. Honeycutt even knew the answer to question No. 28 did not comply with ethics standard 12(b)(2)(A) because the arbitrator's answer did not state the arbitrator would inform the parties of offers and acceptances while the arbitration was pending." (*Honeycutt, supra*, 25 Cal.App.5th at p. 926.) "By failing to serve a notice of disqualification within 15 days

of receiving the arbitrator's defective disclosure, Honeycutt waived her right to disqualify the arbitrator." (*Ibid.*)

Her "remedy for the arbitrator's violations of ethics standard 12(b) was to object to the defective disclosures, demand the arbitrator make complete and compliant disclosures, or move to disqualify the arbitrator at the time. Honeycutt was not entitled to wait and see how the arbitration turned out before raising these issues." (*Honeycutt, supra,* 25 Cal.App.5th at p. 926.) " 'While an arbitrator has a duty to disclose all of the details required to be disclosed pursuant to section 1281.9 and the Ethics Standards, a party aware that a disclosure is incomplete or otherwise fails to meet the statutory disclosure requirements cannot passively reserve the issue for consideration after the arbitration has concluded. Instead, the party must disqualify the arbitrator on that basis before the arbitration begins.' " (*Id*. at p. 927, quoting *United Health Centers of San Joaquin Valley, Inc. v. Superior Court* (2014) 229 Cal.App.4th 63, 85.) "To hold otherwise would allow Honeycutt to ' " 'play games' with the arbitration and not raise the issue" ' until she lost." (*Honeycutt,* at p. 927, quoting *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328.)

The Court of Appeal next addressed the arbitrator's failure to comply with ethics standard 7(d), imposing a continuous requirement to provide notice of the arbitrator's service in any other matters involving the parties or lawyers, and standard 12(d), similarly requiring, in consumer arbitrations, notice of any new matters involving the parties or the lawyers that the arbitrator undertakes while the current arbitration is pending. (*Honeycutt, supra,* 25 Cal.App.5th at p. 928.) The arbitrator violated both of these standards by failing to provide notice of four of the eight new matters the arbitrator handled during the pendency of the arbitration. (*Ibid*.) As to these ethical violations, Honeycutt did not waive her right to demand that the award be vacated, as she did not learn of the failure to give the required notices until after the award. (*Id.* at pp. 930–931; *id*. at p. 931 ["[a] party cannot waive a right she does not know she has"].)

The *Honeycutt* court's discussion of why Honeycutt waived her right to vacate the challenged award based on the arbitrator's violation of ethics standard 12(b), is squarely

applicable to Lerner's claim that Bond violated this same ethical standard, requiring that the award in this case be vacated. Indeed, we need not even decide whether the only reasonable reading of Bond's disclosure statement, given the prominent "X" in the "Yes" box, is that she *would* entertain other work involving the same parties or same lawyers. As the trial court went on to observe, no reasonable person could read the disclosure form to the contrary, i.e., as a disclosure that Bond would not accept other work. The absolute most that can be said about the disclosure form, given the prominent "X' in the "Yes" box and the seemingly crossed-out or scribbled-out check in the "no" box, is that Bond did not provide an adequate answer to item 16.[5]

Lerner was fully aware of this supposed problem as soon as he received his copy of the disclosure form. Accordingly, he was obligated "to serve a notice of disqualification within 15 days of receiving the arbitrator's defective disclosure," and having failed to do so, he waived his "right to disqualify the arbitrator." (*Honeycutt, supra*, 25 Cal.App.5th at p. 926.) His remedy "was to object to the defective disclosures, demand the arbitrator make complete and compliant disclosures, or move to disqualify the arbitrator at the time. [He] was not entitled to wait and see how the arbitration turned out before raising these issues." (*Ibid.*; see *Cox v. Bonni* (2018) 30 Cal.App.5th 287, 306–308.)

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[5] At oral argument, Lerner's counsel pressed the argument that even reading Bond's disclosure as stating, in accordance with ethics standard 12(b)(1), that she would entertain new offers of employment, her disclosure was still deficient because she failed to disclose, in accordance with ethics standard 12(b)(2)(B), that she would not inform the parties of any new offers of employment while the mediation was pending. The JAMS disclosure form adequately made this additional disclosure. As we have recited, item 16 on the checklist included not only the disclosure concerning accepting new offers of employment, but also two additional disclosures, the first of which stated: "If this is a nonconsumer arbitration, this disclosure constitutes a waiver of any further requirement to disclose offers of subsequent employment involving the same parties or lawyers or law firms. (CRC Ethics Standards 12(b).)" This is a sufficient disclosure under ethics standard 12(b)(2)(B). Indeed, that no notice of offers of employment would be given in non-consumer arbitrations, was also expressly pointed out in the disclosure memorandum preceding the checklist.

Lerner has never claimed, in contrast to the plaintiff in *Honeycutt*, that Bond also violated the provision of ethics standards 12(d) and 7(d), requiring disclosure of other matters involving the same parties or the same lawyers. (Notably, unlike the instant case, *Honeycutt* was a "consumer" arbitration in which an arbitrator who discloses that he or she will accept other work in which the parties or the lawyers are participants has, under ethics standard 12(d), an ongoing duty to disclose such work.) Rather, the only assertion Lerner has ever made about notice is that because JAMS gave notice Bond had been selected to mediate a case in which one of the lawyers would be participating, that conclusively established Bond had answered "No" to item 16, because if she had answered "Yes," no further notice was required (in this non-consumer case). Accordingly, there is no record in this case, as there was in *Honeycutt*, that Bond handled any other matter involving the parties or the lawyers as to which notice should have been given, but was not.

Given our conclusion that waiver is dispositive of Lerner's claims based on ethics standard 12, we need not, and do not, address any of the other myriad arguments he advances in support of his assertion that Bond was disqualified and he is entitled to have the arbitration award vacated for her asserted transgression of this standard. Nor do we need to engage in any discussion of *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, which Lerner has strenuously argued (both in the trial court and on appeal) supports his position, or *Dornbirer v. Kaiser Foundation Health Plan, Inc.* (2008) 166 Cal.App.4th 831, which defendants have just as strenuously argued (both in the trial court and on appeal) supports theirs. *Honeycutt* discusses both cases and in a factual context that, in important aspects, is much more similar to the record in the instant case.

Lerner additionally claims Bond was disqualified under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), because " '[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.' "[6] The

[6] Code of Civil Procedure section 1281.9 requires that a neutral arbitrator disclose not only matters as specified by the ethics standards, but also "any ground specified in Section 170.1 for disqualification of a judge." (Code Civ. Proc., §1281.9, subd. (a)(1).)

ostensible basis for disqualification on this ground is that in her initial ruling, Bond did not address the issue of "dissention," which Lerner claims was his pivotal justification for dissolution of 180 Properties LLC. Lerner therefore objected to the ruling, and Bond requested further briefing on the issue. In her amended award, Bond addressed the issue as follows: "Lerner asserts that he is entitled to dissolution because the management of the LLC is subject to 'internal dissention.' The Arbitrator finds that the primary source of disagreement between Lerner and Power and Salter has been because Lerner, relying on the Supermajority provisions, claimed he could 'never' be removed as a manager. The issue has been determined herein [against Lerner]. Lerner cannot rely on the Supermajority provision. [¶] . . . [¶] The fact that there are now three managers of the LLC means that there will be no deadlocks and the mere fact that one manager disagrees with the other two does not constitute 'dissention' sufficient to justify dissolution. It does not prevent the LLC from carrying on its business as a majority vote is sufficient."

Lerner claims Bond got it patently wrong and points out that, before she issued her amended ruling, she had apparently been asked to mediate the other matter. Lerner's assertion that this is a scenario requiring disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), is preposterous and nothing more than a gripe about the substance of Bond's ruling, which is manifestly insufficient to require disqualification. (See *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 203 ["erroneous rulings are not themselves sufficient evidence of bias to warrant removal" under Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii)].)

DISPOSITION

The orders denying appellant's petition to vacate and granting respondents' petition to confirm the arbitration award are affirmed. Respondents to recover costs on appeal.

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Banke, J.

We concur:

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Margulies, Acting P.J.

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Sanchez, J.